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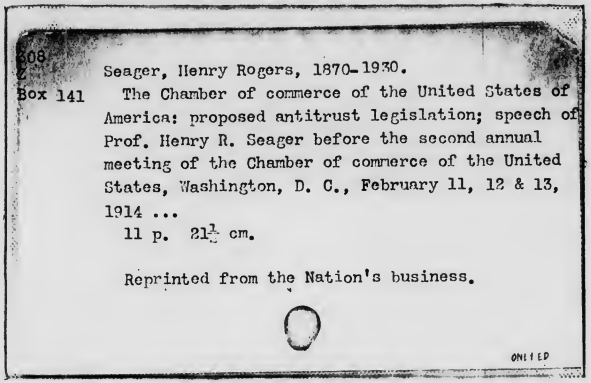
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THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Proposed Antitrust Legislation

SPEECH OF

Prof. Henry R. Seager

BEFORE THE

Second Annual Meeting

OF THE

Chamber of Commerce of the United States

Washington, D. C., February 11, 12 & 13, 1914.

(*Reprinted from The Nation's Business.*)

Nov. 1913 Art

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The Proposed Trust Legislation

Speech of Henry R. Seager, Professor of Political Economy, Columbia University, New York.

THE feature of the proposed trust legislation which I have been asked to make the starting point for my comments is the Interstate Trade Commission. In urging the creation of such a Commission, President Wilson is certainly voicing the mature judgment of students of the trust problem. It is a logical development of the Bureau of Corporations established in 1903, on the initiative of President Roosevelt. It was urged specifically by President Taft in his trust message of December 5, 1911, as a necessary supplement to a federal law providing for the incorporation of interstate commerce companies, which he also advocated. Nearly every witness testifying before the Congressional Committees which have investigated the trust problem during the last five years has spoken in favor of it. Thus the President's anticipation that "the opinion of the country would instantly approve of such a commission" appears to be abundantly justified.

The Newlands' bill to create an Interstate Trade Commission has received more prolonged and careful attention than any of the other three measures now before Congress. It includes the essential features of the bill which Senator Newlands has urged upon his colleagues in the Senate for some time, together with additions designed to increase the efficiency of the Commission as the expert adviser of the attorney-general and the courts. In brief the bill provides:

(1). That a Trade Commission of five members shall be created to take over the work of the Bureau of Corporations;

(2). That corporations engaged in interstate or foreign commerce, except common carriers, shall supply any information that may be required by this Commission, either at periodic intervals or on special occasions, and grant access to their books and records;

(3). That such information shall be made public in such manner and to such an extent as the Commission may deem wise;

(4). That the Commission shall have power to subpoena witnesses and require the presentation of such books and records as may be necessary for its information and that witnesses may not refuse to testify on the ground of incriminating themselves, but shall enjoy the customary personal immunity;

(5). That the Commission shall have power to investigate on complaint alleged violations of the anti-trust act and to report any violations it may discover to the attorney-general;

(6). That it shall also investigate any corporation at the request of the attorney-general or of the corporation itself to determine whether its organization, acts or relations with other corporations involve violation of the anti-trust act and report the changes in its organization, acts or relations with other corporations necessary to bring it into compliance with that act;

(7). Similarly, it may be called upon by any federal court to advise as to aspects of equity suits before it or proposed dissolution decrees under the anti-trust act;

(8). That nothing in the act shall interfere in any way with the authority and duty of the attorney-general to enforce the anti-trust act.

The bill is thus drawn to give the broadest powers to the Commission, but without in any degree weakening the responsibility of the attorney-general for enforcing, or the authority of the courts for interpreting, the anti-trust act. Though doubtless susceptible of improvement in minor respects, I believe that it is well calculated to achieve the ends aimed at without unduly burdening or interfering with business. These ends seem to me highly desirable and I, therefore, regard this part of the legislative program of the Administration as entitled to hearty support.

Advising the attorney-general when the anti-trust act is being violated and assisting the courts to draft dissolution decrees that will secure compliance with it, will be the chief duties of this new Commission. It will thus be a third arm of the government entrusted with responsibility for determining the application of the anti-trust act to specific plans of business organization and specific contracts and practices. One need not be the seventh son of a seventh son to foresee that this third arm will soon be the strong arm, on which the others—the attorney-general and the courts—will come to lean. Its work is to be advisory rather than mandatory but all of our experience with commissions points to the conclusion that its advice as time goes on will be more and more controlling. Under the law, not only is the attorney-general empowered to call upon it for assistance, but any one may address complaints to it, whereupon it must investigate and report its findings and recommendations to the attorney-general. Is it not inevitable under these conditions that that overworked official will soon come to feel that he is performing his whole duty if he undertakes the prosecutions that are expressly recommended by the Commission? In presenting a case in court he will, as a matter of course, give chief prominence to the evidence collected by the Commission and the reasons it may have urged for believing that a violation has occurred. At first the courts may not be greatly impressed by the reasoning of the Commission—the Supreme Court was not at first greatly impressed by the reasoning of the Interstate Commerce Commission—but as time goes on, will not the views of the Commission almost certainly prevail? This may come about through the deliberate conviction of the Supreme Court that it is less competent than the Commission to decide difficult issues wisely and its deference to expert opinion, re-enforced as it certainly will be by cogent argument. Failing this, it may come about through amendments to the anti-trust act made on the recommendation of the Commission and serving virtually to overrule decisions of the courts. Thus as time goes on government prosecutions under the anti-trust act are likely to be those urged by the Trade Commission and the interpretation of the act in connection with the prosecutions is likely to be that approved by the Trade Commission. The creation of such a Commission means inevitably an extension of government by commission. I am in favor of it because I believe that with the growing complexity of business relations, it is only through the guidance of commissions of experts that we can hope to keep these relations straight and to advance sound public policy.

Being in entire accord with the Administration's proposal to create a Trade Commission, I can only regret the more deeply other proposals that will in my judgment prevent that Commission from rendering the great service of which it is capable in guiding the policy of the country with reference to industrial combinations. The second bill in the Administration's program, designed to amend the anti-trust act so as to condemn expressly discriminatory price policies and selling contracts and to give private litigants the advantage of evidence collected or convictions obtained in government suits, is certainly commendable in purpose. We all agree that unfair methods of competition which enable big corporations to wrest markets from their smaller rivals, not because they can produce more economically or make a

profit while selling more cheaply but through the sheer force of their larger resources and the wider range of their operations, must be stopped. If there is any doubt whether these practices would now be condemned under the present law as unlawful restraints on trade—and I do not personally believe that there is—it ought certainly to be removed by further legislation.

The measure against which I particularly protest as unnecessary and harmful is the third bill which undertakes not only to make the punishment for violation of the anti-trust act personal, as I agree it should be, but also to define the terms "every contract," "combination in the form of trust or otherwise" and "conspiracy in restraint of trade" and the word "monopolize," in conformity with the narrowest and most dogmatic conviction that every departure on the part of business men from unrestrained competition necessarily results in restraint of trade and is therefore to be condemned.

ADVANCE INTERPRETATION HAZARDOUS

To judge in advance what interpretation may be given to the phrases of this bill would be hazardous. The first, second and third lines of conduct condemned, that is, "to create or carry out restrictions in trade or to acquire a monopoly in any interstate trade, business or commerce," "to limit or reduce the production or increase the price of merchandise or of any commodity" and "to prevent competition in manufacturing, making, transporting, selling or purchasing of merchandise, produce or any commodity" are probably all fully covered by the present act as involving unreasonable restraint of competition or tendency to create monopoly. The fourth line of action condemned seems, however, to go much farther. If business men may not "make any agreement, enter into any arrangement, or arrive at any understanding by which they, directly or indirectly, undertake to prevent a free and unrestricted competition among themselves or among any purchasers or consumers in the sale, production or transportation of any product, article or commodity" without rendering themselves liable to conviction for crime and to the severe penalties provided by the anti-trust act, current methods of carrying on business in the United States will indeed have to undergo a modification. Under such a provision every understanding between railroads conveying passengers or freight between two cities, involving uniformity of rates, would be a violation of the anti-trust act. The schedule of rates of each railroad would have to be a matter for its independent determination, and if the law were strictly complied with, it would only be through the intervention of the Interstate Commerce Commission that the uniform rates, that have become well-nigh universal throughout the country and which public opinion very generally approves, could be maintained.

The truth is that our governmental policy toward railroads and other common carriers has long been inconsistent. The amendments to the Interstate Commerce Act giving the Interstate Commerce Commission complete control over rates, supplemented as it is about to be by the proposed measure giving it similar control over the issue of new securities, make the present restrictions of the anti-trust act, as laid down in the Traffic Association cases, illogical and unnecessary. Any further restrictions would, in my judgment, be highly undesirable. As regards the common carriers we are committed by the incontestable economic facts, as well as by the terms of the Interstate Commerce Act, to the policy of regulated monopoly. To deny it or to ignore it in amending or extending the anti-trust act is to fly in the face of the intelligent opinion of the country.

It has been customary among economists to draw a rather sharp distinction between railroads, telegraph and telephone companies, street railroads, water, gas and electric light companies and other public utilities, which are styled natural monopolies, and manufacturing, mining and other industrial companies. Monopolistic in their very nature, the first class of businesses will not be adequately regulated by competition. For them we need and have developed machinery for the regulation of rates and charges in the public interest, where we have not actually undertaken government ownership and operation. This distinction is entirely ignored by the present anti-trust act and is equally ignored in the proposed amending bills, from which it might be infered that competition in railroad rates—rate wars—were as much in the public interest as competition in the selling of dry-goods.

I am one of the economists who thinks the distinction between the so-called natural monopolies and industrial enterprises such as coal mining and iron and steel manufacturing has been too sharply drawn. That combination and monopoly in connection with supplying a city like Washington with gas or electric light, with government ownership and operation or government regulation of charges and quality of service, is superior to competition will be generally admitted. I believe it is still an open question economically whether the advantage is not with combination rather than unregulated competition also in some branches of mining and manufacturing.

ECONOMIES AND ADVANTAGES OF CONCENTRATION

You are all familiar with the argument. Let me take the steel in-

dustry as an illustration, since the steel trust has been much in the public mind of late. We have here a branch of industry in which concentration and large scale production make for economy until a scale of operations is attained calling for millions of dollars of capital and thousands of employees. The Carnegie Steel Company, the Jones-Laughlin Steel Company, the Illinois Steel Company all grew up under highly competitive conditions and each attained a gigantic size without passing the point where enlarging the scale of productive operations continued to make for economy in production. But when an industry is of such a character that success necessitates the investment of millions of dollars in each competing aggregation of producing units, you have a situation where the losses due to unrestrained competition are correspondingly enormous. In times of prosperity each producing organization expands to realize more fully the economies of large scale production. Iron and coke properties are secured to insure uninterrupted supply of raw materials, transportation facilities are acquired since the business is so large as to require for its exclusive use fleets of vessels and special railroad carriers, blast furnaces and rolling mills are built in convenient proximity to permit the conversion of raw materials into finished products with least expenditure of time and effort. This development is in obedience to the laws of expanding trade. If the industry is to be economically conducted it must occur. The public interest demands that it shall occur.

A period of depression now ensues. If each of the competing units pursues its own interest blindly, disregardful of the general good of the trade, each will compete desperately to secure the largest share of the diminished trade. Prices will be recklessly cut. It is better to operate mines and mills at low profits, at no profits, or even at a loss, than to have mines and mills shut down, the properties deteriorate and the skilled labor force that has been slowly drawn together dispersed far and wide over the country. There is thus no limit short of actual bankruptcy to which the competitors will not find it to their interest to go so long as they remain competitors. But why should they carry their competition to such reckless lengths? Will it not be better for each and for all to produce moderately at low profits until the depression has passed and conserve all the producing machinery for the time when business will revive, as it surely will revive, and all will again be needed? Is such combination to restrain competition opposed to the interest of the whole community? What useful purpose after all is served by forcing large numbers of steel plants into bankruptcy in every period of depression, with the result that the machinery for production becomes quite inadequate to meet the demand when prosperity returns and prices are forced to levels as unreasonably high as they were unreasonably low during the depression? Instead of having steel either prince or pauper is it not better to have steel a contented and moderately prosperous citizen at all times? It is contended that this life and death competition makes for more rapid improvement in productive methods, but does it? Under a regime of regulated combination each producing unit is still under strong pressure to cut down its expenses of production and to make its profits by that much larger. Is there any real evidence that improvements in methods have not been introduced as rapidly since the steel trust was organized in 1901 as they were before? In that period the open hearth process has been substituted on a vast scale for the Bessemer process. The steel trust has spent millions of dollars in developing its plants at Gary to the highest efficiency yet known in the industry. Its smaller rivals have been equally active. Although in many lines prices have been steadied and run-away markets in either direction prevented, there have been as eager efforts to improve on existing methods and to concentrate production at the points best fitted for it as there ever were before. I admit, however, that this aspect of the matter is debatable. The objection that I urge against this bill which attempts to define "contract," "combination," and "conspiracy in restraint of trade" is that it treats the point as though it were conclusively settled. If it becomes a law and if it is rigidly enforced, as with the aid of a competent Trade Commission it ought to be, our business men will be absolutely barred from taking any steps to restrain competition when its only effect may be to force some of them overloaded with fixed capital into bankruptcy and to so reduce the producing capacity of the country that in the next period of activity there will be as serious an under-supply as there was an over-supply in the period of depression. My plea is that with a Trade Commission empowered to compel full publicity of business operations and the law left as it now is condemning not all contracts and combinations in restraint of competition but only those in unreasonable restraint, we should be able for the first time to test the real merits of combination in the industries where it is claimed to be superior to unregulated competition. We have not been able to make the test in the past because unfair methods of competition have been used and because the opportunity to reap large returns at the expense of so-called "innocent investors" has given an artificial turn to the whole combination movement. The Trade Commission could put

a stop to the use of unfair and discriminatory methods by calling the attention of the attorney-general to them and recommending him to begin prosecutions. The publicity of financial operations which it would require would curb the activities of the promoter and the high financier. Monopoly achieved by artificial means would still fall under the condemnation of the law. There would thus be scope only for restraints on competition which were believed by the Trade Commission and by the attorney-general, acting upon its advice, to be reasonable in the sense that the benefits they might confer on the parties to the agreement or understanding would be shared by the whole community. Would such a policy involve any real risk to the best interests of the country, which the proposed bill penalizing every relaxation of the ardor of competition would preserve? Would it not rather enable us to feel our way along toward a solution of this difficult combination problem that would be permanently satisfactory because balancing fairly the interests of producers and consumers?

POINTS FROM GERMANY

I said a moment ago that I thought the superiority of regulated combination over unregulated competition for other industries—not many but a few—than natural monopolies, was at least debatable. For this country it is debatable, because we have not proved how efficiently we could impose the necessary degree of regulation. For Germany, I submit, it is no longer debatable. German courts early took the view that combination to check an excessive fall of prices in a period of depression might be a good thing for the community as well as for the producers immediately concerned. Consequently regulated combination, not competition made obligatory, has become the established policy of that country. No one who has studied the results of the combination movement in Germany in moderating extremes of prosperity and depression and in promoting foreign trade can doubt that, for that country at least, the policy adopted, which is the exact opposite of the policy that would be confirmed and strengthened for this country by the proposed legislation, has been a good thing. German economists and public men are almost unanimous in approving it, though, of course, admitting that the machinery for regulating the cartels is still inadequate and that a vigorous governmental policy is necessary to prevent producers from taking advantage of consumers. Is it probable that a policy so generally approved in Germany is entirely unsuited to the United States?

Two objections may be urged against the policy of allowing even a little latitude to the combination movement under the supervision

of the proposed Trade Commission. First, it has been said that if given the slightest encouragement the combinations would regulate the Trade Commission rather than the Trade Commission the combinations. This contention would carry more weight to my mind if it were not contradicted by our experience with the Interstate Commerce Commission. No corporations could be more powerful or more firmly entrenched in their privileges than were the railroad companies of this country when the Interstate Commerce Commission was established in 1887. It has been a long struggle but at no stage has there been any suspicion that the Commission was controlled by the railroads. Today the authority of the Commission over railroads is so securely established and so universally acknowledged that there seems more danger that the Commission will not show adequate consideration for the legitimate needs of the railroads than that it will fail to safeguard fully the legitimate rights of the public.

The other objection is the familiar one that such a policy will land us in socialism. I do not think so. I think rather that the creation of an able and efficient Trade Commission for the supervision of industrial combinations will insure for us the advantages of combination, which is one of socialism's most alluring promises, and preserve us from the great loss in efficiency in business organization and management which I conceive to be socialism's greatest weakness.

It is a trite remark that we live in an age of cooperation. My argument against the complete prohibition of anything like concerted action on the part of the directors of our great industries reduces to the plea that our business men be given a chance to cooperate so far as they can and will, but under conditions that will enable all of us to enjoy the benefits of their cooperation. So long as desire for private gain continues the dominant motive of those who engage in business, competition will remain a dominant force in business. But let us not make a fetish of competition! It also has its bad as well as its good side. While recognizing its value and making strenuous efforts to insure it a fair field for its operation, let us not ignore the fact that cooperation also has its legitimate place. On a higher moral plane than competition, its extension, under conditions that compel adequate regard to the public interest, must prove advantageous not only to business men but to the whole community.

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